

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



DEBORAH DIANE WILLIAMS,

Charging Party,

v.

OPERATING ENGINEERS LOCAL 3,

Respondent.

Case No. SF-CO-3-C

PERB Decision No. 2226-C

December 9, 2011

Appearance: Deborah Diane Williams, on her own behalf.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Deborah Diane Williams (Williams) of a Board agent's dismissal (attached) of Williams' unfair practice charge. The charge alleged that Operating Engineers Local 3 (OE) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)¹ by failing to represent Williams following her termination from employment with the Superior Court of Alameda County in breach of its duty of fair representation. The Board agent dismissed the charge for failure to state a prima facie case.²

We have reviewed the entire record in this case. Based on our review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by

¹ The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise noted, all statutory references are to the Government Code.

² Specifically, the Board agent found that PERB had no authority to process the charge. (See, Trial Court Act section 71639.1 [PERB's unfair practice charge procedures are not available to employees designated as management employees under section 71637.1]; *Los Angeles Community College District* (1994) PERB Decision No. 1060 [Board agent must examine the issue of standing prior to determining the existence of a prima facie case].)

the record and in accordance with the applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, supplemented by the brief discussion below.

DISCUSSION

Compliance with Requirements for Filing Appeal

PERB Regulation 32635(a)³ provides that an appeal from a dismissal “shall” comply with the following requirements:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
- (2) Identify the page or part of the dismissal to which each appeal is taken;
- (3) State the grounds for each issue stated.

(Emphasis added.)

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent “on notice of the issues raised on appeal.”

(*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Ibid.*) An appeal that does not reference the substance of the Board agent’s dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.)

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The “appeal” in this matter is a one-page document filed on October 26, 2010. It mainly reiterates facts stated in the unfair practice charge concerning Williams’ termination from employment and OE’s alleged deceitful conduct. In the final paragraph, Williams requested that her “initial complaint be suspended pending, my request for a fraud investigation by the State Attorney General’s Office.” The proof of service describes the document as a “Request to Withdraw Charge.”⁴

The appeal fails to reference any portion of the Board agent’s determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which the appeal is taken, or the ground for each issue stated. Thus, the appeal fails to sufficiently place the Board and OE on notice of the issues raised on appeal and is subject to dismissal on that basis alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Allegations on Appeal

In the first paragraph of the appeal, perhaps by way of introduction, Williams makes further factual allegations concerning the circumstances in which she became a member of OE, which were not presented in the original charge or in the amended charge. “Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting

⁴ The document filed by Williams on October 26, 2010, was not stylized as an appeal. It was referred to by Williams as a request to suspend the charge in the document itself and a request to withdraw the charge in the proof of service. Accordingly, the Board’s Appeals Office sent Williams a letter dated November 3, 2011, seeking clarification. The Board’s letter informed Williams that PERB regulations do not provide a procedure for suspending a charge. The Board’s letter also inquired into Williams’ intentions in filing the document given the appearance that Williams was abandoning her charge and pursuing recourse through the Office of the Attorney General. Williams responded by letter dated November 14, 2011, stating that she had erred in requesting that her charge be suspended and reiterating facts alleged in her charge, similar in substance to those contained in the original document. Because Williams’ response requested that her case be reviewed by the Board, the Board deems the original document filed by Williams with the Board on October 26, 2010, as the appeal in this matter, from which this decision issues herewith.

evidence.” (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when “the information provided could not have been obtained through reasonable diligence prior to the Board agent’s dismissal of the charge.” (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) To the extent Williams intended the statements made in the introductory paragraph of her appeal to be included as part of her charge, there is no reason why she could not have included them in the original charge or in the amended charge. Thus, we do not find good cause to consider these new allegations on appeal.

ORDER

The unfair practice charge in Case No. SF-CO-3-C is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



September 13, 2010

Deborah Diane Williams

Re: *Deborah Diane Williams v. Operating Engineers Local 3*
Unfair Practice Charge No. SF-CO-3-C
DISMISSAL LETTER

Dear Ms. Williams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 17, 2010. Deborah Diane Williams (Williams or Charging Party) alleges that the Operating Engineers Local 3 (Local 3 or Respondent) violated section 71631 of the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)¹ by failing and refusing to fairly represent her following her termination from employment with the Superior Court of Alameda County (Court) on April 23, 2010.

Charging Party was informed in the attached Warning Letter dated June 16, 2010, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 30, 2010, the charge would be dismissed.

After requesting and being granted an extension of time, Charging Party filed a First Amended Charge on September 9, 2010.

Discussion

In the original charge, Williams described herself as a Court Supervisor. In response to the charge, Local 3 asserted that the unit it represents is a management employee unit.

In the attached Warning Letter, Charging Party was informed that without evidence that Court Supervisors are not "management employees" under Section 71637.1, PERB does not have authority to further process the charge. (See *California Correctional Peace Officers Association (Smith, et al.)* (1997) PERB Decision No. 1226-S; *Rocklin Teachers Professional*

¹ The Trial Court Act is codified at Government Code section 71600 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

Association, CTA/NEA (Romero) (1995) PERB Decision No. 1112 and Los Angeles Community College District (1994) PERB Decision No. 1060.)

In response, Charging Party filed an amended charge containing an identical photocopy of the original charge filed May 17, 2010 and one additional document titled "Amendment." This document states:

Personnel Organization, Policies and Rules for the Superior Court of California, County of Alameda:

13.2.7 Management Employee – Management Employee means the Court Executive Officer, his or her chief deputy and assistants, division heads and other positions as designated by the Court.

13.2.14 Supervisory Employee – Supervisory Employee means an employee working in a classification in which a majority of positions: 1) require the incumbent, on a continuing basis, to assign work to and rate work performance of, a subordinate employee, and 2) authorize the incumbent to initiate or review recommendations for dismissal or other disciplinary action.

As written, the above policy specifically includes "other positions as designated by the Court" within the definition of a Management Employee. No other information was provided to establish that Court Supervisors are not "management employees" under Section 71637.1 of the Act as required by the Warning Letter. As such, Charging Party has not established that PERB has authority to further process the charge. (*Los Angeles Community College District, supra*, PERB Decision No. 1060 [Board agent must examine issue of standing prior to determining the existence of a prima facie case].) The charge is therefore dismissed based on the facts and reasons set forth above and in the June 16, 2010 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).)

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Katharine Nyma
Regional Attorney

Attachment

cc: Jolsna M. John, Associate House Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377



June 16, 2010

Deborah Diane Williams

Re: *Deborah Diane Williams v. Operating Engineers Local 3*
Unfair Practice Charge No. SF-CO-3-C
WARNING LETTER

Dear Ms. Williams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 17, 2010. Deborah Diane Williams (Williams or Charging Party) alleges that the Operating Engineers Local 3 (Local 3 or Respondent) violated section 71631 of the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)¹ by failing and refusing to fairly represent her following her termination from employment with the Superior Court of Alameda County (Court) on April 23, 2010.

Williams had been an employee of the Court for over twenty-two years. In September 2008, she was promoted to Court Supervisor. The Court Supervisors are represented by Local 3. In June 2009, Williams was subject to a layoff based on seniority. In April 2010, she was recalled to work as a Court Supervisor, only to be laid off again on April 23, 2010 when the Court's Human Resources department determined that she was not eligible for rehire because she had not completed her 12-month probationary period prior to her initial layoff in June 2009.

Following the April 2010 termination, Williams contacted Local 3 for representation. Local 3 advised Williams that they would not assist her with the appeal of her termination. Based on this failure and refusal to represent Williams in her appeal of her termination, Williams filed the instant charge against Local 3.

In the charge Williams describes herself as a Court Supervisor. In response to the charge, Local 3 asserts that the unit it represents is a management employee unit.

Section 71639.1 of the Act spells out PERB's authority over Trial Court employees. Subsection (c) states:

¹ The Trial Court Act is codified at Government Code section 71600 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

A complaint alleging any violation of this article or of any rules and regulations adopted by a trial court pursuant to Section 71636 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this article, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this article and Section 71639.3. The board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, except that if the rules and regulations adopted by a trial court require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a trial court's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile.

Importantly, in subsection (e) which follows, the Act states:

This section does not apply to employees designated as management employees under Section 71637.1.

Section 71637.1 states in relevant part:

For purposes of this article, in addition to those rules and regulations that a trial court may adopt pursuant to, and in the same manner as set forth in, Section 71636, any trial court may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the trial court and restricting those employees from representing any employee organization that represents other employees of the trial court, on matters within the scope of representation. Except as specifically provided otherwise in this article, this section does not otherwise limit the right of employees to be members of, and to hold office in, an employee organization.

Without evidence that Court Supervisors are not "management employees" under Section 71637.1, PERB does not have authority to further process this charge. (See *California Correctional Peace Officers Association* (1997) PERB Decision No. 1226-S; *Rocklin Teachers Professional Association* (1995) PERB Decision No. 1112 and *Los Angeles Community College District* (1994) PERB Decision No. 1060.)

For these reasons the charge, as presently written, does not state a prima facie case.² If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before June 30, 2010,³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS

² In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

³ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)